

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

People of the State of
Michigan,
Plaintiff-Appellant ^{es}

Supreme Court No. _____

200 Court of Appeals No. 243581 ^{Gpu 4/20/04}

Trial Court No. 02-012151-AR

v

Frank Gatski,
Defendant- Appellee ^{ant}

Ionia
C. Miel

125740
APRIL 4/13
25352
PRO PER APPLICATION FOR LEAVE TO APPEAL

1. The Ionia Circuit Court dismissed the charge of recreational trespass MCL 324.73102(1), against Defendant-Appellee on August 14, 2002, Case No. 02-12151-AR before the Honorable Judge Miel, Ionia Circuit Judge.

2. The Court of Appeals reversed the Circuit Court decision on January 20, 2004 in Case No. 243581. A copy of that decision is attached.

3. This application is filed within 56 days of the Court of Appeals decision.

FILED

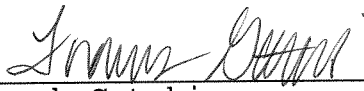
MAR 10 2004

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

RELIEF REQUESTED

For the above reasons I request that this Court GRANT leave to appeal and GRANT any other relief it decides I am entitled to receive.

3/9/2014
Dated


Frank Gatski
311 E. Bridge Street
Portland, MI 48875

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

Frank Gatski, Defendant-Appellee

CA No. 243581

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 on page 7.

GROUND - ISSUES RAISED IN COURT OF APPEALS

7. I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below.

ISSUE 1:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

Did the Circuit Court err in holding that MCL 324.73102(3), meant that a fisherman wading or floating logs could enter onto private property within the clearly defined banks for whatever reason and not be in violation of MCL 324.73102(1)?

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☐ 2. The issue raises a legal principle which is very important to Michigan law.
- ☒ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☒ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

ISSUE 1:

The facts are not in dispute. The Defendant-Appellee was cited for recreational trespass while fishing in the Grand River. Defendant-Appellee was between the banks of the river while fishing and according to the Ionia Circuit Court was not trespassing and was well within his rights. On appeal, the Michigan Court of Appeals disagreed and reversed the decision of the Circuit Court.

As the Court of Appeals correctly stated on page 3 of its opinion, the issue presents a question of statutory interpretation. The main point of contention is found in the language of the exception to the recreational trespass act found in section 73102 (3) in its use of the disjunctive "or" after the word "stream" in the first part of that exception. The language is in fact crystal clear. The "or" is not additive but is disjunctive in that it is setting off conditions in which the exception will apply. If used as an additive the "or" here would render the sentence contradictory.

To determine if an "or" is being used as a disjunctive or an additive one looks to see if it makes sense with that usage. As a disjunctive the "or" in this case clearly set off two conditions under which the exception would apply. One condition would be a fisherman being between the clearly defined banks of the river below the high water line. The second condition would be that a fisherman, in order to avoid an obstacle, is permitted to go out of the banks of the river in order to get around the obstacle. Both of these conditions are expressions of fisherman's rights under Michigan law supported by such cases as Collins v Gerhardt 237 Mich 38 (1924) which directly conflicts with the decision of the Court of Appeals. If the "or" is read as an "and" as the Court of Appeals would suggest, in this case it produces both a logical and a physical contradiction because in order for the exception to be allowed, the fisherman would both have to be in the water between the well defined banks of the river and on the bank avoiding the hazard. The "or" in the exception to recreational trespass statute therefore has to be a disjunction.

The Court of Appeals concluded that the exception under subsection (3) was inartfully drafted by the legislature. Such a position ignores the rich history of fishing and riparian rights cited in Defendant-Appellees brief and disparages countless other statutes where the intent of the legislation was clear in its utilization of the disjunctive "or".

A review of the legislative history behind the recreational trespass statute and the exception to that statute should provide clear guidance to the Court. Senate Bill 145 (4-7-76), provides the basis for the recreational trespass and specifically addresses the exception whereby the consent for fishermen on navigable streams is set forth, backed up by Opinion No. 90, filed April 27, 1964 by

Circuit Court Judge Allan C. Miller. This opinion, cited in Defendant-Appellee's brief is repeated in the exception to the statute almost verbatim.

The Court of Appeals in their analysis of the section (3) exception treat fisherman wading in the water as though they were on the uplands. This completely ignores the status of fishermen and riparian rights well developed in Michigan statutory and case law. Under this interpretation, contrary to Collins v Gerhardt, supra, riparian 'property' owners could put up signs and wires and bar anyone from using the waters of Michigan. The exception under section (3) does not afford Michigan fisherman with an unlimited right as the Court of Appeals speculated but rather allows them to fish the navigable water of Michigan.

Both the Michigan Attorney General and the Michigan Supreme Court have made rulings regarding the unique superior rights that fishermen have in navigable Michigan waters. As was noted in OAG, 1995-1976, No. 4974, page 449 (May 7, 1976): Unlike hunting, the public right to take fish extends to all navigable waters regardless of the ownership of the bed. The Michigan Supreme Court has held that title of riparian is subordinate to the rights of the public to take fish. Attorney General, ex rel Director of Conservation v Taggart et al, 306 Mich 432 (1943).

PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

Frank Gatski, Defendant-Appellee

CA No. 243581

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8, on page 7.

ISSUE II:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

Did the Circuit Court err in holding that Article 18 of the Federal
Energy Reugulatory Commission license held by the licensee/
complaintant did not apply in this case?

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☒ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☐ 2. The issue raises a legal principle which is very important to Michigan law.
- ☒ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☒ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

ISSUE 2:

The Court of Appeals concludes that the Grand River is subject to all requisite legislation of Congress because it is a navigable river. The Court of Appeals claims the Defendant-Appellee attempted to argue that the Grand River is not a public navigable river. Apparently the Court of Appeals was unfamiliar with Defendant-Appellees appellate brief. Defendant-Appellee goes to great lengths (including a lengthy appendix on the 'floating logs' test) to establish that the Grand River is a public navigable river as it pertains to Michigan law. This is precisely why the exception under section (3) in Defendant-Appellee's Issue 1 applies.

For Federal purposes the Grand River is not a "Navigable River" according to the U.S. Army Corps of Engineers (see exhibit one page two)

Defendant-Appellee does cite The Daniel Ball 77 US 557 (1870) and a lengthy statutory history in making his argument that for federal purposes the inland Grand River is not a navigable river subject to interstate commerce and federal supervision. The Ionia Circuit Judge was correct: It is the State of Michigan not the Federal Government which regulates Michigan's inland rivers.

If left to stand, the Court of Appeals decision would negate the authority of the State of Michigan in regulating its waterways and likewise make a nullity of the Michigan Conservation Officer's authority to cite an individual for recreational trespass in Michigan rivers and riparian land. The business of regulating waters would be that of any organization (Consumers Power) constrained by FERC.

In fact, FERC works with the State of Michigan. FERC provides licenses to operate dams. Property rights are governed by the State of Michigan. Consumers Power does not govern nor do they regulate fishing rights in Michigan. Rather the State of Michigan, as Circuit Judge Miel correctly stated, governs and regulates Michigan's waterways.

The Court of Appeals additionally addresses the safety issues as presented in Article 18. The conclusion drawn here was that no trespassing signs were used by Consumers Energy to restrict public access to an area where there existed a significant risk of safety and health. Contrary to the opinion of the Court of Appeals, the Circuit Court did not fail to address the safety issue but discussed it a length. Additionally, Consumers Energy never placed a "Warning" or "Danger" sign to provide notice of any risks of safety. Finally, there has been absolutely no evidence provided at the District, Circuit or Court of Appeals level describing any danger whatsoever as a justification of limiting access to the Grand River. In fact, the dam in question, the Weber Dam, is a run-of-the-river dam meaning the water flows through the dam at a steady non-dangerous pace.